IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 490

HUDSON DISTRIBUTORS, INC.,
Appellant,

v.

ELI LILLY AND COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE APPELLEE

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Jurisdiction

This appeal should be dismissed for want of jurisdiction. The Ohio court proceedings have not resulted in any final judgment of the Ohio Supreme Court but are still pending; and none of the federal questions argued here by Appellant, Hudson Distributors, Inc. ("Hudson"), were properly raised in and decided by the Ohio Supreme Court.

The statute on which Hudson rests its claim of jurisdiction requires a final judgment of the highest state court and is therefore inapplicable. 28 U. S. C. § 1257(2) (1958). And even if a final judgment had been rendered by the Ohio Supreme Court, this Court

would lack jurisdiction because of the absence of any substantial federal question raised in and decided by that court. Both the raising of the question in the highest state court and a clear showing that it was decided by that court are jurisdictional prerequisites.

Questions Presented

Jurisdictional Questions

1. Whether the judgment of the Ohio Supreme Court lacks finality under 28 U. S. C. § 1257(2) (1958) because federal and non-federal factual and legal issues urged by Hudson here were not determined by that judgment and were reserved by the Ohio courts for determination in subsequent proceedings.

2. Whether any of the federal questions Hudson seeks to raise on this appeal were properly presented to and decided by the Ohio Supreme Court.

Questions on the Merits, If Reached*

1. Whether the provisions of the Ohio Act involved in the *McKesson* case question may properly be considered on this appeal since Lilly sells only to wholesalers and therefore does not compete with them.

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* Hudson has listed five questions in its Notice of Appeal and Jurisdictional Statement. These questions are in substance as follows:

1. (a) Whether the provisions of the Ohio Fair Trade Act of 1959 (the "Ohio Act") authorizing a proprietor to establish minimum resale prices for wholesalers with whom it competes conflicts with § 5(a)(5) of the McGuire Act and § 1 of the Sherman Act under this Court's decision in *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956) (the "*McKesson* case question").

   (b) Whether the Ohio Act authorizes a proprietor to require his distributors to enter into "horizontal" resale price agreements or boycott arrangements in conflict with § 5(a)(5) of the McGuire Act and § 1 of the Sherman Act (the "horizontal agreement question").

2. Whether provisions of the Ohio Act authorize fair trade agreements compelling distributors to enter into "horizontal" price fixing agreements or "boycott" arrangements in conflict with the McGuire Act and, if so, whether such provisions have any application to the facts of this case.

3. Whether the provisions of the Ohio Act pursuant to which Lilly established minimum resale prices by entering into written contracts with over 1,400 retailers and gave notice of the prices so established to other retailers in Ohio, including Hudson, conflict with the McGuire Act.

4. Whether the Ohio Act, as applied to the facts of this case, is constitutional under the due process clause of the Fourteenth Amendment to the United States Constitution.

Statutes Involved

In addition to the statutes cited at pages 3-4 of Hudson's Brief, the following provisions of 28 U. S. C. § 1257 (1958) are also involved in this case:

"Final judgments or decrees rendered by the highest court of a State in which a decision could

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(c) Whether the Ohio Act authorizes the establishment of of minimum resale prices by notice without "the consensual agreement intended by Congress" in conflict with the McGuire Act and § 1 of the Sherman Act (the "notice question").

2. Whether the Ohio Act is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution (the "due process question").

3. Whether "the federally unconstitutional provisions" of the Ohio Act are severable (the "severability question").

For convenience of reference, these questions will sometimes be referred to by the parenthetical title appearing above at the end of each question.

be had, may be reviewed by the Supreme Court as follows:

* * * * *

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Statement

Hudson is the owner and operator of a retail drug chain located in Cleveland, Ohio and is an affiliate of corporate operators of drug stores in other communities in Ohio (R. 19, 24). Appellee, Eli Lilly and Company ("Lilly") manufactures pharmaceutical products bearing its trade names and trade marks (R. 20).

Lilly sells its products directly to wholesalers and makes no sales to retailers (R. 19-20). Hudson concedes this (R. 19-20; Br. 14-15). Hudson purchases Lilly brand products from Regal D. S., Inc. ("Regal"), a wholesaler incorporated in the State of Michigan and located in the City of Detroit (R. 25). As Hudson describes Regal's business, Regal is "engaged in the sale of drugs and cosmetics to Hudson and other companies affiliated with Hudson" (Br. 15). Hudson is a wholly owned subsidiary of Regal. *Hudson Distributors, Inc.* v. *Eli Lilly and Co.*, 1963 Trade Cases ¶ 70,871 (Ct. of Common Pleas).

On January 22, 1958, the Ohio Supreme Court held the non-signer provisions of the Ohio Fair Trade Act of 1936 unconstitutional under the Ohio Constitution. *Union Carbide & Carbon Corp.* v. *Bargain Fair, Inc.*,

167 Ohio St. 182, 147 N. E. 2d 481 (1958). In June 1959, the Ohio Legislature, by overwhelming majorities in both houses enacted Ohio Revised Code Sections 1333.27-34 (the "Ohio Act"). The new act provided in part that the voluntary purchase of a trademarked commodity with knowledge of the trademark owner's fair trade price constituted a contract between such purchaser and the trademark owner not to resell the commodity at less than the fair trade price. The Ohio Act became effective on October 22, 1959.

On October 1, 1959, Lilly sent letters to all Ohio retailers, including Hudson, notifying them of Lilly's intention to establish minimum retail resale prices for its trademarked products pursuant to the Ohio Act, and inviting them to enter into written fair trade contracts with Lilly (R. 20-21). More than 1,400 Ohio retailers of Lilly's products (about 65% of all the retail pharmacists in Ohio) signed fair trade contracts with Lilly identical to the one set forth in Exhibit B to Lilly's Answer and Cross-Petition (R. 12, 34).

Hudson refused to enter into a written contract with Lilly and ignored the minimum resale prices which Lilly had established by such contracts pursuant to the Ohio Act (R. 22). However, Hudson continued to purchase and accept commodities produced by Lilly and identified by its trade names or trade marks (R. 22).

On December 10, 1959 and January 26, 1960, Lilly notified Hudson that the Ohio Act required Hudson to observe the minimum retail resale prices for Lilly commodities obtained by Hudson with notice of such minimum prices (R. 21). Nevertheless, Hudson con-

tinued to resell Lilly products at less than the minimum retail resale prices (R. 22).

On January 11, 1960, Hudson filed an Amended Petition (the "Petition"), which was the basis of the decisions below, in the Court of Common Pleas for Cuyahoga County for a declaratory judgment declaring the Ohio Act invalid in its application to Hudson (R. 1, 6-7).

In its Amended Petition, Hudson primarily urged the invalidity of the Ohio Act under the Ohio Constitution (R. 2-5). It also challenged the validity of various sections of the Ohio Act under the due process clause of the United States Constitution (R. 5-6). The only other federal questions raised were one relating to Section 1333.29(B) and two, later abandoned in the Ohio appellate courts and not raised in this Court, relating to Sections 1333.32(A) and 1333.32(B).*

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* Hudson alleged that Section 1333.29(B), "which provides that after giving notice, the proprietor may require the distributor to sell at not less than the minimum resale price stipulated by the proprietor and may further require the distributor not to sell to any other distributor without first obtaining an agreement from such other distributor that he will not sell at prices less than the minimum resale prices stipulated by the proprietor", is contrary to and inconsistent with Sections 5(a)(2) and (3) of the McGuire Act in that the latter act only permits states "to enact legislation authorizing contracts or agreements prescribing minimum prices" (Petition, para. B.1; R. 5).

Hudson alleged that Section 1333.32(A), making it unlawful for one with notice to sell, offer or advertise for sale any fair traded commodity at less than the fair trade price conflicts with the McGuire Act in that the latter Act requires a non-signer to "act wilfully and knowingly" (Petition, para. B.2; R. 5). Paragraph B.3 of the Petition (R. 5-6) alleged that Section 1333.32(B), permitting suit by any person reasonably anticipating damage, "is contrary to and inconsistent with Section 5(a)(3) of the McGuire Act, in that, under the McGuire Act, suit may be brought only by a person actually damaged". These are the allegations abandoned by Hudson in the Ohio appellate courts and not raised in this Court.

On February 29, 1960, Lilly answered and cross-petitioned for enforcement of the Ohio Act against Hudson. The parties stipulated in open court that the question of the validity of the Ohio Act, raised by Hudson's Amended Petition, would be separated from the question of the enforcement of the Act, raised by Lilly's Answer and Cross-Petition, and tried first. Thereafter, the constitutional phase of the case was submitted on stipulated facts (R. 19-22).

The Court of Common Pleas held the Ohio Act unconstitutional under the Ohio Constitution, relying on *Union Carbide & Carbon Corp.* v. *Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. 2d 481 (1958). The sole basis for the decision was the Ohio Constitution and no other questions raised by the Amended Petition or Answer and Cross-Petition were discussed or decided.

On appeal, the Court of Appeals for Cuyahoga County reversed the trial court, holding that the Ohio Act was free of the infirmities found in the Ohio Fair Trade Act of 1936, and remanded the case "for further proceedings according to law with respect to the cross-petition . . ." (R. 43).

In its brief to the Court of Appeals for Cuyahoga County, Hudson focused primarily on the validity of the Ohio Act under the Ohio Constitution. The only federal issue raised by Hudson in its brief in the Court of Appeals related to the notice question. In its Petition for Rehearing, Hudson for the first time raised the *McKesson* case question. Hudson raised no federal due process question in the Court of Appeals

There was no reference in either the majority or minority opinions of the Court of Appeals to any federal question. The sole reference to any federal issue by the Court of Appeals was a recital in its judgment that the provisions of the Ohio Act

> "are declared to be valid, lawful and enforceable enactments of the Ohio General Assembly and not to be in violation of the Constitution of the State of Ohio or of the Constitution of the United States or of any law of the United States . . ." (R. 42).

On appeal, the Supreme Court of Ohio affirmed the judgment of the Court of Appeals for Cuyahoga County sustaining the constitutionality of the Ohio Act and remanding the case to the trial court for further proceedings on the Cross-Petition. As in the lower Ohio courts, Hudson's attack on the Ohio Act dealt mainly with the validity of the Act under the Ohio Constitution. The only federal issues raised by Hudson in its brief to the Ohio Supreme Court related to the notice question, the *McKesson* case question and the Federal Food, Drug and Cosmetic Act questions. However, in its reply brief to the Ohio Supreme Court, Hudson raised for the first time its horizontal agreement question and referred to paragraph 6 of Lilly's fair trade contract.* Again Hudson raised no federal due process question.**

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* Paragraph 6 reads as follows: "Retailer agrees not to knowingly sell any of Manufacturer's 'Identified Commodities' to any dealer who fails to observe the minimum retail resale prices established under Paragraph 3 hereof" (R. 13).

** In its Petition for Rehearing to the Ohio Supreme Court, Hudson raised no federal questions.

In its opinion and judgment, the Supreme Court of Ohio made no reference to any federal question.

In its brief in this Court, Hudson seeks to raise the notice question, the *McKesson* case question and the horizontal agreement question. In addition, it resurrects the due process question abandoned below in both the Court of Appeals for Cuyahoga County and the Ohio Supreme Court. It argues, for the first time in the entire action, that the Ohio Act is invalid under the Lanham Act, 60 Stat. 427 (1946), 15 U. S. C. § 1051 *et seq.* (1958). It also argues that the Ohio Act is invalid under the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040 (1938), 21 U. S. C. § 301 *et seq.* (1958), an issue referred to by Hudson below only in its brief in the Ohio Supreme Court and not mentioned by Hudson in either its Notice of Appeal or Jurisdictional Statement in this Court.

On the threshold question of this Court's jurisdiction, it is significant that all three decisions of the Ohio courts discussed only the state constitutional issues; that all three Ohio courts considered this case with the companion *Upjohn* case, No. 489, where, as in this case, the non-constitutional issues were reserved by stipulation for subsequent adjudication; and that all three Ohio courts dealt only with the facts and questions common to both the *Lilly* and *Upjohn* cases.*

* The trial court stated that the cases involved "the same questions" (R. 371). The Court of Appeals stated: "Both cases involve similar facts and, with the questions to be determined by this Court the same in each case, the appeals will be considered together" (R. 380). The Supreme Court stated that "[t]he facts in both cases are similar and the law applicable is the same" (R. 413).

To sum up, in its Amended Petition, Hudson raised the notice question (Hudson's Question 1(c) here) and the due process question (Hudson's Question 2 here). In the Court of Appeals, Hudson raised the notice question and the *McKesson* case question (Hudson's Question 1(a) here) but abandoned the due process question. In the Supreme Court, Hudson raised the notice, *McKesson* case and Federal Food, Drug and Cosmetic Act questions and for the first time in its reply brief raised the horizontal agreement question (Hudson's Question 1(b) here). In this Court, Hudson raises the notice, *McKesson* case and Federal Food, Drug and Cosmetic Act questions, seeks to revive the due process question and for the first time attempts to inject the Lanham Act question.

Not one of these federal questions was decided by any of the three Ohio courts. The trial court, finding the Ohio Act invalid under Ohio law, did not reach any federal question. Presumably for this reason, the Court of Appeals confined its opinion to questions of state law, made no reference to any federal question and remanded to the trial court.* The Ohio Supreme Court likewise discussed only state questions and affirmed the judgment of the Court of Appeals remanding the case to the trial court.

On remand, the parties proceeded with the enforcement phase of the proceedings, and Lilly obtained an injunction and award of damages against Hudson.

* The sole reference to the United States Constitution was the unexplained conclusory statement, in the Court of Appeals judgment, that the Ohio Act was not in violation of the United States Constitution or any law of the United States. This gives no clue as to whether that court focused on or found it necessary to decide any particular federal question.

In these enforcement proceedings, Hudson raised the following defenses by its Second Amended Answer to Lilly's Cross-Petition:

(1) Hudson did not wilfully resell at less than Lilly's fair trade prices;

(2) Lilly, a foreign corporation, was not properly licensed to transact business in the State of Ohio;

(3) paragraph 6 of Lilly's fair trade contract compelled retailers to enter into unlawful horizontal price fixing agreements in violation of Section 1 of the Sherman Anti-trust Act (readily identifiable as Hudson's "horizontal agreement question");

(4) Lilly was not uniformly enforcing its fair trade program on trade-marked commodities in Ohio; and

(5) Lilly modified its fair trade program by abandoning enforcement on its prescription products in Ohio.*

This award was vacated and set aside by the Court of Common Pleas, Cuyahoga County, and a new trial granted on allegations of disqualification of the trial judge. *Hudson Distributors, Inc.* v. *Eli Lilly and Co.*, 1963 Trade Cases ¶ 70,871 (Ct. of Common Pleas). Further proceedings have been stayed by the Court of Common Pleas pending the outcome of this appeal.

* The record of the enforcement proceedings, being subsequent to the Ohio Supreme Court decision appealed from, is of course not included in the record here. However, being a part of the same case, it should be judicially noticed by the Court. Hudson obviously will not deny having raised these defenses, and the full text of the pleading in which they were raised is set out in full in Appendix A hereto. Even if they had not actually been raised, it would be apparent to the Court that the remand would make it possible to raise them.

Appendix B hereto contains a tabulation of the questions urged by Hudson, showing the extent of Hudson's failure to raise the questions below, the absence of any decision below upon them, the extent to which they depend on unadjudicated interpretations of the Ohio Act, and their inapplicability in major instances to the facts of this case.

Summary of Argument

I.

The judgment of the Ohio Supreme Court is not a "final judgment" under 28 U. S. C. § 1257 (1958). Accordingly, this Court lacks jurisdiction. The trial court reserved for further proceedings, now pending on remand to the Court of Common Pleas, the enforcement of the Ohio Act against Hudson by Lilly. In those proceedings, Hudson itself asserts the right to raise, and has raised, federal and non-federal factual and legal questions not before this Court on this appeal, including at least one question, relating to the validity of paragraph 6 of the Lilly contract, which it now attempts to raise here. The Ohio Supreme Court's judgment is not the "effective determination of the litigation" required for appellate jurisdiction in this Court. *Market Street Railway Co.* v. *Railroad Commission,* 324 U. S. 548, 551 (1945).

II.

On appeal from a judgment of a state court, this Court has jurisdiction to decide only questions which were both raised and determined in the state court.

Alabama State Federation of Labor v. *McAdory*, 325 U. S. 450 (1945). None of the questions which Hudson attempts to raise on this appeal meets that test.

A.

The *McKesson* case question was not properly raised before, and was not decided by, the Ohio Supreme Court. Under Ohio law, it could not be raised on appeal since it had not been raised in the trial court.

B.

The horizontal agreement question also was neither properly raised before nor decided by the Ohio Supreme Court. Under Ohio law, it could not be raised in the Ohio Supreme Court because it had not been raised in either the trial court or the Court of Appeals. In addition, it is premised on interpretations of the Ohio Act not made by the Ohio Supreme Court. These relate to whether Section 1333.34 restricts Section 1333.29(B) and whether Section 1333.29(B) authorizes refusal-to-sell agreements with respect to interstate transactions. This Court will not supply its own interpretations of a state statute for the purpose of judging its validity. *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 470 (1945).

C.

The notice question, premised on an interpretation of the Ohio Act as not requiring any written contracts, demands an interpretation which the Ohio courts were not required to, and did not, make in this case.

D.

The due process question was abandoned by Hudson in the Ohio appellate courts and cannot be revived

here. *Beck* v. *Washington*, 369 U. S. 541, 549-554 (1962); *Herndon* v. *Georgia*, 295 U. S. 441 (1935).

E.

The severability question is not a federal question.

F.

The Lanham Act and Federal Food, Drug and Cosmetic Act questions, not raised by Hudson in its Notice of Appeal or Jurisdictional Statement here, cannot be raised for the first time in Hudson's brief to this Court. Supreme Court Rules 10(2)(c), 15(1)(c)(1) and 40-(1)(d)(2).

III.

The provisions of the Ohio Act applicable to the facts of this case are made fully applicable to interstate commerce by the McGuire Act.

A.

Lilly does not compete with its wholesalers. Consequently, this case does not involve any facts which could conceivably raise a question concerning the last sentence of Section 1333.29(A) of the Ohio Act, which authorizes a proprietor under certain circumstances to establish minimum resale prices for wholesale distributors with whom it competes. Hudson's hypothetical argument poses nothing for this Court to consider.

B.

The McGuire Act expressly authorizes fair trade agreements requiring the vendee in turn to obtain fair trade agreements from subsequent purchasers. This fully accommodates Subsection 29(B)(2) of the Ohio Act which contains the same authorization.

Hudson's attack on Subsection 29(B)(2) is wholly hypothetical. Lilly has not in fact required its vendees to obtain or agree to obtain fair trade agreements from others. Paragraph 6 of Lilly's fair trade con-

tracts, under which the retailer agrees not knowingly to sell Lilly commodities to any dealer who fails to observe Lilly's resale prices, does not require the retailer to enter into agreements with anyone. The Ohio courts have not been called upon to decide whether paragraph 6 is a permissible method of enforcement under Ohio law and if so whether the Ohio statute authorizes it as to interstate commerce or only intrastate commerce. Moreover, Hudson is neither bound nor affected by paragraph 6. Hudson makes no claim that anyone has refused to sell to it.

The Ohio courts, if presented with the question, might well hold that paragraph 6, whether or not specifically authorized by the Ohio Act, is a valid method of insuring fair and non-discriminatory observance of fair trade prices by those already lawfully obligated to observe them. If valid under Ohio law, it is exempted from the Federal antitrust laws by paragraph 3 of the McGuire Act as a right of enforcement of a state-created substantive right. All known retailers of Lilly products in Ohio have either entered into written fair trade contracts with Lilly or have been notified of the fair trade prices established by such contracts and are bound to observe them. Congress left to the states the selection of the methods of fair trade enforcement. The United States Constitution and the McGuire Act do not require Ohio to permit a retailer complying with the fair trade law to aid and abet its violation by others.

C.

Lilly established its resale price maintenance program in Ohio by entering into written fair trade contracts with over 1,400 retailers and thereafter

notifying all other known retailers in Ohio, including Hudson, of the written contracts and the resale prices. Under Ohio law, as embodied in the Ohio Act, Hudson's voluntary act of purchasing Lilly products for resale in Ohio, with notice from Lilly that it had established minimum resale prices, constituted a contract with Lilly to observe such prices.

The contract between Hudson and Lilly recognized by Ohio law is also a contract under paragraph 2 of the McGuire Act, which authorizes "any contracts" for resale price maintenance which are lawful "under any statute, law, or public policy now or hereafter in effect in any State."

Even if the term "any contracts or agreements" in paragraph 2 of the McGuire Act did not include the contract recognized by the Ohio Act as arising from the acts of the parties, paragraph 3 of the McGuire Act would sustain Lilly's enforcement of the resale price against Hudson. Lilly admittedly had express fair trade contracts with others and paragraph 3 independently exempts from the antitrust laws the enforcement of fair trade prices against persons having knowledge of the prices prescribed in such contracts.

The Ohio Act could be interpreted as requiring the establishment of resale prices by entering into at least one written contract. This interpretation would remove the premise of Hudson's argument that the Ohio Act is not authorized by the McGuire Act in that the state statute allows the establishment of resale prices by notice alone.

Even if the Ohio Act were interpreted as permitting the establishment of resale prices by notice alone, para-

graph 3 of the McGuire Act exempts from the Sherman Act the exercise and enforcement of rights and rights of action under such a state statute. In any event, the resale prices involved in this case were not established by notice alone but by hundreds of express contracts, and the question raised by Hudson is once again hypothetical.

D.

The Ohio Act safeguards the same interest of the trademark owner recognized in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936) as an interest which the states might constitutionally protect through fair trade laws. Congress by the McGuire Act, which was enacted subsequent to the Lanham Act, specifically authorized state fair trade legislation to apply to interstate commerce.

E.

The Ohio Act provides that minimum resale prices are not applicable if no use is made of the proprietor's trademark or trade name. The Federal Food, Drug and Cosmetic Act permits Hudson to remove the manufacturer's labeling so long as Hudson places its own label on the drugs. Therefore, the Ohio Act in no way conflicts with the Federal Food, Drug and Cosmetic Act.

IV.

The unanimous decision of this Court in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936) specifically considered and rejected an argument identical to Hudson's argument that the Ohio Act deprives it of property without due process of law in violation of the Fourteenth Amendment. *Old Dearborn* established that the United States Constitution

contains nothing to prevent a state from enacting a fair trade law permitting resale price maintenance enforceable against both contracting and non-contracting parties. Decisions as to the economic and social wisdom of a state statute are legislative, not judicial. *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963).

V.

The question whether provisions of a state statute are severable has long been recognized to be a matter for the state courts to decide. *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Dorchy* v. *State of Kansas*, 264 U. S. 286 (1924).

ARGUMENT

I.

This Court lacks jurisdiction since the judgment appealed from is not final.

It is the burden of an appellant to demonstrate the jurisdiction of this Court to review on appeal a state court decision. *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 651 (1942). In this case Hudson cannot do so.

The statute on which Hudson relies for jurisdiction, 28 U. S. C. § 1257(2) (1958), requires that the appeal be from a judgment or decree of the highest court of a state which is "final". This Congressional requirement of finality is designed to assist in the maintenance of harmonious federal-state relationships. *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 124 (1945).

Accordingly, this Court refrains from interfering with state court proceedings by refusing to exercise its

jurisdiction until the state court has finally resolved all issues in the case. *Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62, 67-69 (1948). The state court judgment "must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street Railway Co.* v. *Railroad Commission,* 324 U. S. 548, 551 (1945).

Whether a state court judgment is final within the jurisdictional requirements of 28 U. S. C. § 1257 (1958) is for this Court to determine. *Cole* v. *Violette,* 319 U. S. 581, 582 (1943). The rule as to appeals from state court judgments is that complete and definitive disposition of all issues must have been made by the judgment being reviewed.* "[T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62, 68 (1948). *Accord, Gospel Army* v. *Los Angeles,* 331 U. S. 543 (1947).

In cases where the state court judgment contemplates further discretionary proceedings at the trial court level, the judgment is not final and is not reviewable by this Court. A clear example of this type of

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* The finality rule as applied to appeals from state courts must be distinguished from the rules applicable to appeals from federal courts. Generally, there is no requirement of finality in appeals to this Court from federal courts (see, *e.g.,* 28 U. S. C. §§ 1252, 1253, 1254, 1255, 1256 (1958) and, even in cases where finality is required, the requirement is significantly less strict than in appeals from state courts. Boskey, *Finality of State Court Judgments Under the Federal Judicial Code,* 43 Col. L. Rev. 1002, 1003 (1943).

judgment is one which orders a new trial, since issues not raised by the original pleadings can then be presented. *Gospel Army* v. *Los Angeles*, 331 U. S. 543 (1947). Only in cases where the further proceedings contemplated involve mere ministerial acts, such as entry of a judgment by the lower court, is the decree regarded as final. *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 382 (1953); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942). In the present case, the remand by the Ohio Supreme Court to the trial court for further proceedings clearly deprives this Court of jurisdiction. *Southern Pacific Co.* v. *Gileo*, 351 U. S. 493 (1956). The proceedings on remand are still pending. Far from involving mere ministerial acts, these proceedings have involved amendments to pleadings, the taking of additional evidence, and submission of briefs.

As a result of these further remand proceedings, it would be possible for the litigation to terminate without any necessity of ever deciding a constitutional question. For example, Hudson is now contending in the remand proceedings that its violation of the fair trade prices was not willful, as required by the McGuire Act, 66 Stat. 632 (1952), 15 U. S. C. § 45(a)(1)-(5) (1958); that Lilly lacks standing to sue for want of qualification in Ohio as a foreign corporation; that Lilly has waived its right to enforce fair trade prices against Hudson because of its failure to enforce them against others; and that Lilly has in effect abandoned its fair trade program in Ohio (see Appendix A hereto). And, of course, amendment by Hudson of its pleadings in the pending enforcement proceedings could bring in

still further non-federal issues, factual or legal. *Republic Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948); *Gospel Army* v. *Los Angeles*, 331 U. S. 543 (1947).

In addition, Hudson is raising in the remand proceedings one of the constitutional questions which it most insistently urges in this Court and which was not passed upon in the earlier proceedings in the Ohio courts. This question relates to paragraph 6 of the Lilly Manufacturer-Retailer Contract (see p. 11, *supra*).

Hudson also urges in its brief to this Court supposed constitutional questions relating to the Federal Lanham Act and the Federal Food, Drug and Cosmetic Act. Hudson has not yet raised these points in the remand proceedings; but, judging from its raising of the paragraph 6 issue in those proceedings, it may well do so before the remand proceedings are over.

As will be shown in II below, these and other constitutional questions urged by Hudson here are not before the Court because not properly presented to and decided by the Ohio courts in the proceedings below. In the present state of the record, this Court cannot even dispose of all the federal questions on which Hudson seeks a determination, much less the additional questions which might develop in the remand proceedings and which might themselves be dispositive of the litigation. Hudson is thus requesting of this Court a piece-meal interference with state court proceedings which are still far from final judgment.

Never in the history of this Court, so far as counsel have been able to discover, has this Court ever entertained an appeal under 28 U. S. C. § 1257(2) (1958) under the circumstances presented here.

II.

None of the federal questions urged by Hudson in this Court were properly presented to and decided by the Ohio Supreme Court.

Under the settled practice of this Court, jurisdiction to determine the federal constitutionality of a state statute is not recognized until the courts of the state have first had an opportunity to pass upon the statute's constitutionality and have done so. *Adler* v. *Board of Education*, 342 U. S. 485, 496 (1952); *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945). Time and again, this Court has pointed out that review by it of state court decisions is limited to specific federal constitutional questions, raised and preserved according to state procedure and passed upon. Unless the constitutional questions which Hudson now urges on this appeal were so raised and preserved, and expressly or necessarily decided by the Ohio Supreme Court, basic jurisdictional requisites are lacking in this Court. *Adler* v. *Board of Education, supra; Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 128 (1945); *Murdock* v. *City of Memphis*, 87 U. S. 590 (1875).*

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* It is elementary that the noting of "probable jurisdiction" is no impediment to dismissal if jurisdiction is subsequently shown to be lacking. The policy against premature constitutional adjudications demands that all doubts as to jurisdiction be resolved against appellants. *Republic Gas Co.* v. *Oklahoma*, 334 U. S. 62, 71 (1948).

The Rules of this Court specify with great particularity the showing required by an appellant to meet these jurisdictional tests where the appeal is from a state court. Under subdivision 1(d) of Rule 15, the appellant must

> "specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

These requirements were ignored by Hudson both in its Jurisdictional Statement and in its Brief. It did not and cannot meet the requirements of Rule 15.*

It is beyond dispute that the Ohio courts did not expressly decide any federal question. Although all three courts below wrote lengthy opinions, not a word

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* Briefs and oral arguments before state courts are not part of the record filed in this Court and cannot be used to establish that a federal question has been raised and preserved below. See, *Live Oak Water Users' Association* v. *Railroad Commission*, 269 U. S. 354 (1926). We have, however, analyzed the briefs in the Ohio courts and they establish the contrary as to the federal questions Hudson attempts to raise here.

relating to the federal questions is found in any of them. The only reference to the federal constitutionality of the Ohio Act by any of the Ohio courts is a 17 word conclusory statement in the judgment of the Cuyahoga County Court of Appeals that the Ohio Act is not "in violation . . . of the Constitution of the United States or of any law of the United States" (R. 42). Such a statement gives this Court no way of knowing whether even the intermediate Ohio Court addressed itself to, or found it necessary to decide, any particular federal question. If such a statement conferred jurisdiction on this Court, it could only be jurisdiction to roam through the entire Constitution and all the laws of the United States in quest of any provision which might be violated. Hudson concedes that no federal question was "reached" or "passed upon" by the Court of Common Pleas of Cuyahoga County and that the Court of Appeals for Cuyahoga County and the Ohio Supreme Court did not consider or discuss any federal questions in their opinions* (Jur. State. 2, 7-8; Br. 2-3).

As a question-by-question analysis readily demonstrates, the federal questions which Hudson now attempts to raise either were not raised below at all, are not presented by the facts of this case, or were abandoned or reserved in the course of the Ohio proceed-

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* In its Brief in this Court (p. 2), Hudson has partially shifted ground, so far as the Court of Appeals is concerned, by claiming that "the federal constitutional issues raised by Hudson were disposed of by reliance upon *Standard Drug Company, Inc.* v. *General Electric Company*, 202 Va. 367, 117 S. E. (2d) 289 (1960) *app. dismissed*, 368 U. S. 4 (1961)." However, it is clear from the opinion of the Court of Appeals that the *Standard* case was relied upon only in connection with state constitutional issues raised by Hudson.

ings, and none of them were passed upon by the Ohio Supreme Court.

A. The *McKesson* Case Question (Hudson's Question 1(a)).

The *McKesson* case question was neither raised in the Court of Common Pleas for Cuyahoga County nor in Hudson's briefs as appellee in the Cuyahoga County Court of Appeals. Only after the Court of Appeals reversed the judgment of the Court of Common Pleas did Hudson first raise the question in its Petition for Rehearing to the Court of Appeals (R. 40).

Under Ohio procedure, failure to raise a federal constitutional question in the trial court bars its consideration on appeal. *City of Columbus* v. *Ewing*, 77 Ohio L. Abs. 31, 148 N. E. 2d 95 (Ct. of App. 1957); *State ex rel. McKay* v. *Board of Elections of Montgomery County*, 65 Ohio L. Abs. 547, 115 N. E. 2d 858 (Ct. of App. 1953). Since the question was not timely raised and not considered by the Ohio appellate courts, it cannot be considered by this Court. *Stembridge* v. *Georgia*, 343 U. S. 541, 547 (1952); *C. I. O.* v. *McAdory*, 325 U. S. 472, 477 (1945).

In any event, as discussed in III below (see pp. 34-35), the *McKesson* case question is wholly hypothetical since Lilly sells only to wholesalers with whom it does not compete (R. 19-20).

B. The Horizontal Agreement Question (Hudson's Question 1(b)).

In this Court, Hudson apparently claims that Section 1333.29(B) of the Ohio Act conflicts with paragraph 5 of the McGuire Act in two respects. First, it

argues that Section 1333.29(B) authorizes a proprietor to compel its distributors to enter into written fair trade agreements with competitors of such distributors. Second, Hudson argues that Section 1333.29(B) authorizes a proprietor to compel its distributors to agree not to sell to competitors of such distributor if the competitor fails to observe minimum resale prices. Neither question is properly before this Court.

The horizontal agreement question was raised for the first time in Hudson's reply brief in the Supreme Court of Ohio. As noted above, the question was not timely raised under Ohio procedure and was not considered by the Ohio courts. Therefore, it cannot be considered by this Court. *Stembridge* v. *Georgia*, 343 U. S. 541, 547 (1952); *C. I. O.* v. *McAdory*, 325 U. S. 472, 477 (1945).

That the missing ingredient of this Court's jurisdiction is no mere procedural technicality, but goes to the very core of sound constitutional adjudication, is vividly illustrated by Hudson's effort to raise here the horizontal agreement question.

The premise of Hudson's request that this Court declare the Ohio Act unconstitutional is that the Ohio Act conflicts with the McGuire Act by authorizing a proprietor to require his distributors to enter into horizontal price agreements and refusal-to-sell arrangements. This premise, however, requires interpretation of the Ohio Act. If the Ohio Act does not authorize a proprietor to require such horizontal arrangements, the constitutional question disappears. The Ohio courts have not said whether it does or does not. The Court of Common Pleas did not, for the question was

neither briefed nor argued nor even mentioned in the pleadings or the evidence. The Court of Appeals did not, for the question was never referred to at any time by anyone. And the Ohio Supreme Court did not, and indeed under Ohio procedure could not, since no such issue had been raised in or dealt with by the lower courts.

Not only have the Ohio courts not given the Ohio Act the interpretation basic to even the existence of the constitutional question posed by Hudson, but it is highly doubtful that they would. Far from authorizing or requiring horizontal agreements, Section 1333.34 of the Ohio Act prohibits them. Hudson bases its contention on Section 1333.29(B) of the Ohio Act which authorizes fair trade contracts under which buyers are required to obtain fair trade contracts from those to whom they resell (Br. 49-50). That Section does not, however, say that such agreements may be required among competitors, and is limited by Section 1333.34 which prohibits agreements between competitors.*

Even if this were not so, there would still be a question of interpretation for the Ohio courts. They would have to determine whether the provision permitting a proprietor to require horizontal agreements between

* The qualifying clause ("except as otherwise specifically provided in Section 1333.29") which appears in Section 1333.34 quite obviously relates not to Section 1333.29(B) but to Section 1333.29 (A), which is the only subdivision of Section 1333.29 containing any provision specifically excluding the applicability of Section 1333.34 (such exclusion appearing in the sentence permitting a proprietor under certain circumstances to establish resale prices for his wholesale distributors even though competing with them). Hudson's attempt to read the specific exclusion of Section 1333.34 as applying to all of Section 1333.29 would read Section 1333.34 out of the Act since there is no other provision of the Ohio Act to which Section 1333.34 could apply.

competitors was intended to apply to interstate commerce or only to intrastate commerce. Under familiar principles, if extension of such a provision to interstate commerce would raise a constitutional question, any ambiguity would presumably be resolved in favor of confining it to intrastate commerce.

A further question of interpretation for the Ohio courts (regardless of whether or not Section 1333.29(B) were interpreted as limited by Section 1333.34) would be whether Section 1333.29(B) does or does not authorize agreements requiring refusals to sell (or, to use Hudson's term, "boycotts") of any kind. Certainly the Ohio Act does not say so; there is no such language anywhere in the Ohio Act. To give the Ohio Act such an interpretation the Ohio courts would have to read a boycott authorization into the statute.*

Few rules are more firmly established than the rule that where the constitutional validity of a state statute depends upon its interpretation, and the statute has not been interpreted by the state courts, this Court will not supply its own interpretation.** It is possible that

* In connection with its horizontal agreement argument, Hudson lays considerable stress on paragraph 6 of Lilly's fair trade contract, under which the retailer agrees not to knowingly resell to fair trade violators. However, the Ohio courts were not called upon to interpret or apply either paragraph 6 of the contract or Section 1333.29(B) of the Ohio Act in relation to paragraph 6. The question whether paragraph 6 was authorized by the Ohio Act was not before the Ohio courts because by stipulation only the constitutionality of the Ohio Act was to be determined. Except in a reply brief in the Ohio Supreme Court, paragraph 6 was never even mentioned.

** *United States v. Raines*, 362 U. S. 17 (1960); *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 575, 584 (1947); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-348 (1936) (concurring opinion of Mr. Justice Brandeis. Even were the Court to do so here, its interpretation of the Ohio Act would not be binding on the courts of Ohio. *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 470 (1945).

the Ohio courts would interpret the Ohio Act in a manner which would remove all alleged inconsistencies between that Act and the McGuire Act. As stated in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 470, 471 (1945):

> "Most courts conceive it to be their duty to construe a statute, whenever reasonably possible, so that it may be constitutional rather than unconstitutional. [Cases cited] * * * State courts, when given the opportunity by the presentation to them for decision of an actual case or controversy, may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them. [Cases cited] In advance of an authoritative construction of a state statute, which the state court alone can make, this Court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional question. For us to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow. [Cases cited] Such is not the function of the declaratory judgment."

As shown in III below (p. 36), the horizontal agreement question is entirely hypothetical since there is no suggestion in the Lilly record that Lilly has required retailers to enter into any agreements with anyone.

C. The Notice Question (Hudson's Question 1(c)).

Although the notice question has been raised in one form or another throughout this case, it has never been

passed upon by the Ohio courts. Indeed, it is difficult to determine precisely what the question is. As stated by Hudson to this Court (Br. 4), the question is whether the Ohio Act conflicts with the McGuire and Sherman Acts "by authorising the 'proprietor' of a trademark or trade name, who need not necessarily be the owner thereof, to establish minimum resale prices by notice to distributors without the consensual agreement intended by Congress."

The record shows that Lilly established minimum resale prices by written contracts with over 1,400 retailers in Ohio. Follqwing this, Lilly gave notice to Hudson, and all other known Ohio retailers who had not executed written agreements, of the fact that Lilly had so established minimum resale prices. As shown in III below (p. 42), the question presented by Hudson is again hypothetical.

Hudson apparently takes the position that even though the McGuire Act admittedly permits non-contracting parties to be bound by resale prices under state fair trade statutes, the McGuire Act sanctions only state statutes which in addition *require*, as well as *permit*, express contracts to observe the minimum prices. There is no dispute that Lilly actually entered into more than 1,400 such contracts, but the argument is that the Ohio Act does not require, but only permits, such express contracts and is therefore outside the McGuire Act.

This view of the McGuire Act, far-fetched as it is, requires an interpretation of the Ohio Act. Does the Ohio Act in fact require, or does it only permit, express contracts for minimum resale prices? The

Ohio courts have not answered or even considered this question of statutory interpretation. On one interpretation the supremacy clause question asserted by Hudson would vanish. The question is therefore premature.

Hudson is asking this Court to make an interpretation of the Ohio Act which, according to Hudson's interpretation of the McGuire Act, would render the Ohio Act unconstitutional. As this Court stated in *St. Louis S. W. Ry.* v. *Arkansas,* 235 U. S. 350, 369 (1914):

> "No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature intended to act within the scope of its authority."

D. The Due Process Question (Hudson's Question 2).

The Amended Petition in this proceeding contained allegations raising the federal due process question (R. 6). However, the question was never heard of again in the Court of Common Pleas, in the Court of Appeals for Cuyahoga County or the Ohio Supreme Court. Indeed there was no mention of it until Hudson's Notice of Appeal in this Court.

Since Hudson did not preserve the federal due process question throughout the appellate proceedings in Ohio, it abandoned this question under Ohio law. *Uncapher* v. *B. & O. Rd. Co.,* 127 Ohio St. 351, 356, 188 N. E. 553 (1933); *Riss & Co.* v. *Bowers,* 114 Ohio App.

429, 438, 183 N. E. 2d 795 (1961); *Drobne* v. *Aetna Casualty & Surety Co.*, 66 Ohio L. Abs. 1, 115 N. E. 2d 589 (Ct. of App. 1950). To enable this Court to review this question, Hudson would have had to raise it in the Ohio Supreme Court in accordance with the requirements of Ohio law. *Beck* v. *Washington*, 369 U. S. 541, 549-554 (1962). Hudson's abandonment of this question in the Ohio appellate courts is fatal to its attempt to raise it here. *Herndon* v. *Georgia*, 295 U. S. 441 (1935); *Beaty* v. *Richardson*, 276 U. S. 599 (1928).

In any event, the unanimous opinion of this Court in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936), settled the meaning of the Constitution on the due process question nearly 30 years ago. The due process question is therefore not a federal question warranting review by this Court.

E. The Severability Question (Hudson's Question 3).

Even if it should be determined that any provision of the Ohio Act is invalid as applied to interstate commerce, the question arises whether the remaining provisions of the Act are severable. The severability of invalid provisions of a state statute is a question solely for determination by the state courts, not by this Court (see p. 67, *infra*).

F. The Lanham Act and Federal Food, Drug and Cosmetic Act Questions.

The Lanham Act question was not raised at any time in the Ohio Courts and the Federal Food, Drug and Cosmetic Act question was not raised until Hudson's Brief to the Ohio Supreme Court. Neither point

was mentioned in Hudson's Notice of Appeal or Jurisdictional Statement in this Court.

Rules 10(2)(c), 15(1)(c)(1) and 40(1)(d)(2) of this Court provide that only the questions set forth or fairly comprised within the Notice of Appeal and Jurisdictional Statement will be considered by this Court. Hudson is precluded from raising these questions now, both because they were not raised and decided below and because they were not set forth or fairly comprised in the questions set forth in either the Notice of Appeal or the Jurisdictional Statement.

III.

There is no conflict between the Ohio Act and the McGuire Act on the facts of this case.

Hudson specifically challenges only a few provisions of the Ohio Act, none of which are applicable to the facts of this case.

A. Since Lilly Does Not Compete With Its Wholesalers, the *McKesson* Case Question Is Not Involved in This Proceeding.

Hudson argues that the concluding sentence of Section 1333.29(A) of the Ohio Act, authorizing a proprietor to establish minimum resale prices for wholesale distributors with whom it competes, conflicts with the McGuire Act, citing this Court's decision in *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956). The *McKesson* case held that the McGuire Act did not permit the largest drug wholesaler in the country to set fair trade prices, on products it manufactured, to be observed by wholesalers with whom it competed.

The record in this case is clear, and Hudson concedes, that Lilly sells its products to wholesalers only and does not sell to any retailers (R. 19-20; Br. 14-15). Since Lilly does not compete with wholesalers for whom it sets fair trade prices, and because the only fair trade prices applicable to Hudson are those set for retailers, the question raised by Hudson is wholly hypothetical.

Since at least as early as 1885, this Court has never deviated from its fixed practice of declining to decide abstract, hypothetical or contingent questions. In *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885), this Court, in refusing to pass upon the constitutionality of a statute where it was not clear from the record that there were facts to which the statute would apply, said:

> "If, on the other hand, we should assume the plaintiff's case to be within the terms of the statute, we should have to deal with it purely as an hypothesis, and pass upon the constitutionality of an act of Congress as an abstract question. That is not the mode in which this court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

This principle was reiterated and applied in the Court's decision in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945) where the Court reviewed many of the numerous cases in which it had adhered to this practice over the years since its 1885 pronouncement in the *Liverpool* case.*

Since there is nothing about Lilly's distribution system, and not a line in the record, to raise any conceivable question regarding the sentence in Section 1333.29(A) of the Ohio Act attacked by Hudson, Hudson's hypothetical argument poses nothing for this Court to consider.

B. Section 1333.29(B) of the Ohio Act as Applied to the Facts of This Case Does Not Conflict with the McGuire Act.

The difficulties involved in Hudson's insistence on raising questions premised on dubious interpretations of the Ohio Act not made by the Ohio courts are nowhere more dramatically illustrated than in its argument of the horizontal agreement question. Hudson claims that Section 1333.29(B) of the Ohio Act authorizes horizontal price agreements and horizontal boycotts and is therefore "in violation of Section 5(a)(5) of the McGuire Act" (Br. 50).

Hudson's argument in summary is this:

> (1) Subsection 29(B)(2) of the Ohio Act authorizes a proprietor, by notice, to require a distributor to obtain an agreement from any subsequent buyer from the distributor that such buyer

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* Other cases involving this principle include the following: *United States* v. *Raines*, 362 U. S. 17 (1960); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-348 (1936) (concurring opinion of Mr. Justice Brandeis); *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350 (1914); *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405 (1900).

will observe the proprietor's minimum resale prices;

(2) Although that Subsection does not specifically so provide, it could be interpreted as authorizing a proprietor to require a distributor, by notice, not to sell to any buyer from such distributor if the buyer does not observe the proprietor's minimum resale prices (and therefore impliedly authorizes paragraph 6 of Lilly's fair trade contracts with Ohio retailers);

(3) The distributor and the subsequent buyer or prospective buyer from the distributor could be competitors;

(4) "Horizontal" agreements are prohibited by paragraph 5 of the McGuire Act;

(5) Therefore, Subsection 29(B) of the Ohio Act authorizes "horizontal" price fixing and refusal-to-sell agreements forbidden by the McGuire Act.

As shown above (pp. 26-28), this argument requires interpretation of the Ohio Act in at least two major respects which the Ohio courts were not called upon to, and did not, consider.

This entire question is hypothetical. Lilly's fair trade contracts with retailers did not contain any provision requiring the retailer to enter into agreements with anyone. Moreover, paragraph 6 of Lilly's fair trade contract is not involved in this case since Lilly does not seek to require Hudson to refuse to sell to any other person, nor does Hudson claim that any other retailer has refused to sell Lilly's products to Hudson.*

* As shown by Lilly's letters to Hudson, Lilly's only demand was that Hudson observe Lilly's minimum fair trade prices. They contained no demand on Hudson to refuse to sell to anyone (R. 15-18).

Even if the validity of Subsection 29(B)(2) of the Ohio Act, as applied to the facts of this case, were properly before this Court, there is no conflict between that Subsection, reasonably interpreted, and paragraph 5 of the McGuire Act. Paragraph 2 of the McGuire Act authorizes not only contracts and agreements "prescribing minimum or stipulated prices" but also contracts and agreements "requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices". The House Committee Report on the McGuire Act characterizes this as "a provision expressly covering a contract which requires a vendee to enter into *another* contract prescribing a minimum or stipulated price."* (Emphasis supplied).

The McGuire Act thus expressly permits a trademark owner to require a written contract for observance of his resale prices not only by purchasers from the owner but also by subsequent buyers from the first purchaser. Subsection 29(B)(2) of the Ohio Act contains an identical authorization.

All this is undenied by Hudson. Its whole argument is that paragraph 2 of the McGuire Act is limited by paragraph 5 of that Act, prohibiting contracts between competitors, but that Subsection 29(B)(2) of the Ohio Act is not similarly limited by Subsection 34 of the Ohio Act. As shown above (p. 27), Subsection 34 of the Ohio Act does plainly limit Subsection 29(B)(2). Hudson's argument cannot be sustained without attributing different meanings to substantially identical provisions of the two statutes.

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* H. R. Rep. No. 1437, 82nd Cong., 2d Sess., at p. 6 (1952).

Reference has been made above (pp. 26-27) to the fact that the Ohio Act does not specifically authorize agreements requiring refusal-to-sell agreements and to the open question of statutory interpretation in this respect.* However, assuming that paragraph 6 of the Lilly fair trade contract is authorized by the Ohio Act, the McGuire Act is no bar. Lilly has executed fair trade agreements with over 65% of the retailers in Ohio. By notice, it has bound all other known retailers in Ohio selling products bearing Lilly's trademarks to observe Lilly's resale fair trade prices (R. 20-21). Thus, all retailers in Ohio dealing in Lilly's products are bound by the Ohio Act to observe Lilly's resale prices.

Paragraph 6 is nothing more than a method of ensuring a non-discriminatory resale price maintenance program and enforcing observance of the fair trade prices by persons already obliged to observe them.**

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* If the validity of paragraph 6 of the Lilly contract should be put in issue before the Ohio courts and held to be not authorized by the Ohio Act, such a holding would not affect the remaining provisions of the Lilly fair trade contract since paragraph 9 of that contract provides that "[t]his Contract shall be interpreted under and shall be subject to the limitations imposed by the Fair Trade Act of the state in which Retailer does business, and in the event any provision of this Contract shall be held invalid under such Act or under any other statute, law, or public policy, or in the event this Contract shall be held inapplicable with respect to any given set of facts or circumstances, then, or in either of such events, the remaining provisions of this Contract and its applicability to all other sets of facts or circumstances shall be unaffected thereby." (R. 14).

** This method of enforcement was employed in *Kunsman* v. *Max Factor & Co.*, 299 U. S. 198 (1936), one of the companion cases decided with *Old Dearborn*. "[B]y the terms of . . . [plaintiff's] contracts the distributors are obligated to sell these products only to retailers who will resell the same at specified prices, and who, in turn, have entered into a written contract with the plaintiff. . . ." *Max Factor & Co.* v. *Kunsman*, 5 Cal. 2d 446, 55 P.2d 177, 179 (1936).

It has been uniformly held under state fair trade laws that a trademark owner must take all reasonable steps necessary to enforce his resale prices in a fair and non-discriminatory manner or be deemed to have abandoned its fair trade program. Such steps include refusing to sell to retailers who do not observe the fair trade prices.* *Hutzler Bros. Co.* v. *Remington Putnam Book Co.*, 186 Md. 210, 46 A.2d 101 (1946); *U. S. Time Corp.* v. *Grand Union Co.*, 64 N. J. Super. 39, 165 A.2d 310 (Ch. 1960); *Calvert Distillers Company* v. *Wish*, 162 F. Supp. 364 (N. D. Ill. 1957), *aff'd*, 259 F. 2d 323 (7th Cir. 1958); *Calvert Distilling Co.* v. *Gold's Drug Stores*, 123 N. J. Eq. 458, 198 Atl. 536 (Ch. 1938); *Calvert Distillers Corp.* v. *Nussbaum Liquor Store*, 166 Misc. 342, 2 N. Y. S. 2d 320 (Sup. Ct. N. Y. Co., 1938). As the court said in the *Grand Union* case (165 A.2d at p. 315):

> "He must refrain from causing any unjust discrimination among the retail dealers, and in addition must exercise reasonable diligence to see that his products are not sold to a retailer who cuts prices after the producer has notice of such violation and he may be required to resort to legal action if necessary."

No one disputes that the Ohio Act by its terms permits enforcement of fair trade prices against distributors acquiring a trademarked commodity with notice of the fair trade price, even though not expressly contracting to observe the price. If under Ohio law one

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* Indeed, Hudson, in the subsequent enforcement proceedings in this case, has pleaded as an affirmative defense that Lilly abandoned its fair trade program because it failed to cut off violators. *Hudson Distributors, Inc.* v. *Eli Lilly and Co.*, 1963 Trade Cases ¶ 70,871 (Ct. of Common Pleas).

of the rights given as a means of enforcement of the fair trade prices is a right to prevent price violators from obtaining the commodity, there is no McGuire Act problem. Paragraph 3 of the McGuire Act expressly declares that nothing contained in the antitrust laws shall render unlawful the "exercise or the enforcement of any right or right of action" created by any such statute.

Hudson's argument regarding paragraph 6 amounts to saying that Ohio is required by the United States Constitution and the McGuire Act to see to it that a retailer complying with the fair trade law is permitted to aid and abet its violation by others. If anything is clear about the McGuire Act, it is that Congress intended to permit state fair trade laws, in the language of the House Committee Report, to "apply in their totality".* They could not so apply unless the states are permitted to make them effective and to require their non-discriminatory enforcement and observance.

The *Parke, Davis* case cited by Hudson in support of its position (Br. 27) is not in point.** That case involved resale price maintenance in jurisdictions having no fair trade laws in effect. Since resale price agreements were unlawful under local law, the enabling provisions of the McGuire Act were inapplicable.***

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* H.R. Rep. No. 1437, 82d Cong., 2d Sess., at p. 2 (1952).

** *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960).

*** Nor does *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956) have any application to paragraph 6. That case merely held that a wholesale may not set fair trade prices on products it manufactures for a competitor wholesaler. There is not the slightest suggestion in the record that Lilly has entered into agreements with, or purported to set resale prices to be observed by, any competitor.

Similarly, in *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 129 F. 2d 651, 654 (2d Cir. 1942), the issue was "[t]he wrong the plaintiff suffered . . . when it was excluded as a distributor" by the defendant before the enactment of the Miller-Tydings Act, 50 Stat. 693 (1937), 15 U. S. C. § 1 (1958), for refusing to adhere to resale price maintenance in interstate commerce. In *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944), the defendant had also commenced resale price maintenance in interstate commerce before enactment of the Miller-Tydings Act. The Court found that the defendant's fair trade practices, "otherwise valid" after the passage of the Miller-Tydings Act, had come into existence as "a patch upon an illegal system of distribution" (321 U. S. at p. 724) and covered products manufactured by others and therefore not eligible for resale price maintenance. In *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945), wholesalers and retailers had combined to compel manufacturers to adopt resale price maintenance, a combination clearly not authorized by the Miller-Tydings Act.

By this argument, Hudson is asking this Court (a) to decide a hypothetical question, (b) to make two very dubious interpretations of the Ohio Act not made by the Ohio courts, and (c) to construe the McGuire Act as prohibiting a reasonable method of enforcing state statutory rights, and on that basis to invalidate this state statute under the supremacy clause of the United States Constitution.*

* U. S. Const. art. 6, cl. 2.

C. The Provisions of the Ohio Act Under Which Lilly Established Its Resale Price Maintenance Program Are Authorized by the McGuire Act.

When the Ohio Act was enacted, Lilly established its resale price maintenance program in Ohio by entering into written fair trade contracts with over 1,400 retailers. After Lilly had established minimum resale prices for its trademarked commodities by these written contracts, it so notified all other known retailers in Ohio, including Hudson. Hudson was informed that, under the law of the State of Ohio, it would be bound to observe such minimum resale prices with respect to any products bearing Lilly's trademark which it acquired after receiving notice of the restrictions. After receiving such notice, Hudson purchased Lilly products and sold them below the minimum prices established by the contracts described above.

The notice question posed by Hudson is thus wholly hypothetical. Whether the statute would authorize the establishment of minimum resale prices by notice alone, without the written contracts, is not presented by the facts of this case.*

Hudson argues that the provisions of the Ohio Act under which Lilly established minimum resale prices

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* Hudson's hypothetical question embodies a hypothetical sub-question as to whether fair trade prices may be established by persons other than the owner of the trademark or trade name. Lilly, of course, is the owner of all trademarks affixed to its goods (R. 20). Consequently, whether the Ohio Act authorizes persons who are not trademark owners to establish minimum resale prices is also a hypothetical question. *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.*, 205 F.2d 788, 792 (5th Cir. 1953), *cert. denied*, 346 U. S. 856 (1953).

by written contracts, followed by notice of such prices to others, are not authorized by the McGuire Act. That they are so authorized is demonstrable by examination of paragraphs 2 and 3 of the McGuire Act.

Paragraph 2 of the McGuire Act.

Paragraph 2 of the McGuire Act provides in part as follows:

> "Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, . . . when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, . . ."

Section 1333.29(A) of the Ohio Act provides that "[i]t shall be lawful . . . for a proprietor to establish . . . by contract, stipulated minimum resale prices for a commodity of which he is the proprietor. . . ." Paragraph (B) of that section provides that a proprietor may give notice to a buyer "that the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof. . . ." Section 1333.28(I) provides, in part, that:

> "Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

Thus, under the law of Ohio, Hudson, by its voluntary act of purchasing Lilly's trademarked products for resale in Ohio after receipt of notice from Lilly that it had established resale prices on its trademarked goods by written contracts with others, entered into an implied contract with Lilly to observe such prices. As we understand Hudson's argument, it contends that the contract between Hudson and Lilly was not the kind of "contract or agreement" covered by paragraph 2 of the McGuire Act. This is incorrect.

In 1951, this Court considered whether the Miller-Tydings Act removed from the prohibition of the Sherman Act, 26 Stat. 209 (1890), 15 U. S. C. § 1 (1958), a state statute which authorized a trademark owner, by notice, to require a retailer who had not executed a written contract to observe resale price maintenance. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951). Calvert argued in that case that, since the Sherman Act outlawed "contracts", and the Miller-Tydings amendment to the Sherman Act excepted "contracts or agreements prescribing minimum prices for the resale" of a commodity when such contracts or agreements were lawful under state law, the Miller-Tydings Act immunized all arrangements involving resale price maintenance authorized by state law (341 U. S. at pp. 389-390).

After examining the history of the Miller-Tydings Act, the Court held that Congress had intended the words "contracts or agreements" as contained in that Act to cover only arrangements whereby the retailer had expressly agreed to be bound by the resale price

restrictions. The Court stated that (341 U. S. at p. 395):

> "It should be remembered that it was the state laws that the federal law was designed to accommodate. Federal regulation was to give way to state regulation. When state regulation provided for resale price maintenance by both those who contracted and those who did not, and the federal regulation was relaxed only as respects 'contracts or agreements,' the inference is strong that Congress left the noncontracting group to be governed by preexisting law."

Thus, although the relationship between the trademark owner and the non-signer was one of "contract" for the purposes of the Sherman Act, the words "contract or agreement" in the Miller-Tydings Act were given a narrower construction and applied only to express contracts.

Shortly after the *Schwegmann* decision, Congress passed the McGuire Act.* This Act was specifically designed to overrule the *Schwegmann* decision. The Report of the House Committee on Interstate and

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* The purpose of the McGuire Act was stated as follows in its preamble: *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce" (66 Stat. 631-632 (1952)).

Foreign Commerce, which accompanied the McGuire Act, declared that:

> "The primary purpose of the [McGuire] bill is to reaffirm the very same proposition which, in the committee's opinion, the Congress intended to enact into law when it passed the Miller-Tydings Act (act of August 17, 1937, title VIII, 50 Stat. 673, 15 U. S. C. sec. 1), to the effect that the application and enforcement of State fair-trade laws—including the nonsigner provisions of such laws—with regard to interstate transactions shall not constitute a violation of the Federal Trade Commission Act or the Sherman Antitrust Act. This reaffirmation is made necessary because of the decision of a divided Supreme Court in *Schwegmann* v. *Calvert Distillers Corporation* (341 U. S. 384, May 21, 1951). In that case, six members of the Court held that the Miller-Tydings Act did not exempt from these Federal laws enforcement of State fair-trade laws with respect to nonsigners. Three members of the Court held that the Miller-Tydings Act did so apply.
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> "The end result of the Supreme Court decision has been seriously to undermine the effectiveness of the Miller-Tydings Act and, in turn, of the fair-trade laws enacted by 45 States. *H.R. 5767, as amended, is designed to restore the effectiveness of these acts by making it abundantly clear that Congress means to let State fair-trade laws apply in their totality; that is, with respect to nonsigners as well as signers.*" (Emphasis supplied).*

By the McGuire Act, Congress specifically expressed its intent to permit trademark owners to require retailers to observe resale price restrictions where state

* H.R. Rep. No. 1437, 82d Cong., 2d Sess., at pp. 1-2 (1952).

fair trade laws so allow, irrespective of whether the retailer expressly contracted to abide by such restrictions. The McGuire Act took pains to exempt "*any* contract" which would come within the provisions of the Sherman Act from the prohibitions contained in that Act, making clear its intention that the McGuire Act should apply to whatever contract state law might recognize as lawful.

If citation of authority be necessary to show that the meaning of "any" is "any", this Court has provided it. *Kilpatrick* v. *Texas & Pacific Railway Co.*, 337 U. S. 75, 77 (1949); *McMurray* v. *Brown*, 91 U. S. 257 (1875). Congress was perhaps aware of this Court's holding nearly a hundred years ago in the *McMurray* case that the words "any contract" in a statute "are sufficiently comprehensive to include special contracts as well as contracts which arise by implication" (91 U. S. at p. 265). By its terms, its history and its stated purposes, paragraph 2 of the McGuire Act means precisely what it says: "any contracts" relating to resale price maintenance which are lawful "as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State" are lawful under the McGuire Act.

The question of how contracts are to be entered into, and what contracts are lawful under state law as applied to intrastate transactions, is obviously a question for the state to determine. By the Ohio Act, the State of Ohio has determined that, when a retailer receives from a trademark owner an offer to permit the retailer to utilize the owner's property in-

terest in its trademark in exchange for the retailer's agreement to abide by the owner's resale price restrictions, the retailer's subsequent voluntary use of the owner's trademark is an acceptance of the offer and a contract. It cannot be denied that a trademark owner has a proprietary interest in his trademark. "[G]oodwill is property in a very real sense . . . [g]oodwill is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such goodwill." *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, 194-195 (1936). As the *Old Dearborn* decision stated (299 U. S. at pp. 194-195):

> "Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. . . . The ownership of the good will . . . remains unchanged, notwithstanding the commodity has been parted with."

Section 1333.31 of the Ohio Act does nothing more than legislatively reflect this holding of that Court.*

Such a contract is within the common law meaning of contract. Williston states that a contract may arise from a "seller's making a general offer to all the world in this way, to be accepted by taking ownership in the

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* Section 1333.31 provides that: "A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name."

property, provided consideration could be found for the promise of the purchaser, and also such communication to the promisee as is necessary for a contract." 1 WILLISTON, CONTRACTS, § 90E (3d ed. 1957). As the Ohio Supreme Court succinctly analyzed this contract:

> "This provision of the law is essentially very simple. It is simple contract law. The owner of a trademark offers his goods bearing that mark which are in free and open competition in the open market for resale, on condition that the retail price be maintained at a certain level. This is basic contract law; an offer may be made on condition. Under the Ohio law, the owner of the trademark, once the goods enter into Ohio, has by statute sufficient interest to control the resale price of the goods. The acceptance of this offer is purely voluntary, but if it is accepted it must be accepted on the imposed conditions or not at all. If the offer is accepted, the retailer in consideration of the goodwill attached to the trademark and the demand created by the owner thereof contracts to sell it at the agreed price." *Hudson Distributors, Inc.* v. *The Upjohn Co.*, 174 Ohio St. 487, 190 N. E. 2d 460, 463 (1963).

That decision also pointed out that similar contracts are legislatively implied in many other situations (190 N. E. 2d at p. 463):

> "Legislative conditions and contracts are not new in the law, they appear in many instances, and once the parties enter into an agreement they are bound by the legislative contract no matter what the parties intended. This is exemplified in the law relating to insurance contracts wherein statutory provisions and conditions are imposed in every insurance contract no matter what the intent of the parties. This is true as to statutory

bonds, negotiable instruments, bulk sales and mechanics' liens."

Hudson, by purchasing Lilly's trademarked products for resale in Ohio after receiving an offer from Lilly to permit Hudson to use Lilly's property interest in that trademark, accepted Lilly's offer and, pursuant to the provisions of the Ohio Act, entered into a contract with Lilly in a manner recognized by Ohio law.* An offer, acceptance and consideration in the common law sense were present. Paragraph 2 of the McGuire Act, which exempts from the antitrust laws "any contracts or agreements prescribing minimum or stipulated prices . . . when contracts or agreements of that description" are authorized by state law, covers this contract between Hudson and Lilly.**

Paragraph 3 of the McGuire Act.

Even if the term "any contracts or agreements" in paragraph 2 of the McGuire Act did not include the contract recognized by the Ohio Act, arising from Hudson's voluntary purchase of goods bearing Lilly's trademark with a knowledge of the resale price re-

* *Bulova Watch Co. Inc.* v. *Zale-Norfolk, Inc.* (No. 2570, Court of Law and Chancery of the City of Norfolk, Virginia), cited by Hudson (Br. 71), held that the Virginia fair trade statute did not imply a contract where a retailer obtained the products involved from a source other than the trademark owner. This construction of the Virginia statute is obviously inapplicable to the Ohio Act since the latter Act, unlike the Virginia statute, specifically provides that a contract arises "whether [the distributor] acquires such commodity directly from the proprietor or otherwise. . . ." Section 1333.28(I).

** *Accord*, Note, 77 Harv. L. Rev. 763 (1963).

striction, paragraph 3 of the McGuire Act would sustain Lilly's enforcement of the resale prices against Hudson.* Lilly established minimum resale prices by written contracts, as authorized by Section 1333.29(A) of the Ohio Act. It then gave notice of the establishment of these prices to Hudson and informed Hudson that it could not resell any Lilly trademarked products at less than the minimum prices stipulated in the written contracts. Section 1333.32(A) of the Ohio Act provides that it is an act of unfair competition for Hudson, with notice that Lilly has established minimum resale prices, to purchase and resell Lilly's commodities at less than the minimum prices.

Although never clearly articulated, Hudson apparently argues that paragraph 3 of the McGuire Act covers only state statutes which require, and not merely permit, the establishment of retail prices by a written contract, while the Ohio Act can only be interpreted as permitting the establishment of resale prices by notice alone without the necessity of having

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* Paragraph 3 reads as follows:

> "Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby."

any written contracts. As pointed out above, the Ohio courts have not made such an interpretation. Lilly had established resale prices by hundreds of written contracts. The Ohio courts had no occasion to, and did not, decide whether the Ohio Act would make the notice to Hudson binding absent any such contracts. Had the Ohio Courts been asked to interpret the Ohio Act on this point, they would have been aware that "[m]ost courts conceive it to be their duty to construe a statute, whenever reasonably possible, so that it may be constitutional rather than unconstitutional". *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 470 (1945).

Even assuming that the McGuire Act sanctions only state statutes which require the existence of at least one written contract, the Ohio Act could have been so interpreted. Section 1333.29(A) of the Ohio Act, the principal operative provision of this Act, provides that it shall be lawful "for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity. . . ." This provision can be read as meaning that it shall be lawful "for a proprietor to establish stipulated minimum resale prices [by contract]" and to "control [stipulated minimum resale prices] by notice to distributors or by contract."*

* Indeed, only a comma after the word "establish", in the portion of Section 1333.29(A) quoted above, would be needed to make this the only reasonable interpretation. The comma which presently appears in the quoted part of Section 1333.29(A) is grammatically erroneous unless another comma is read into that quoted part after the word "establish".

This interpretation seems indicated when compared with Sections 1333.32(A) and 1333.28(I) of the Ohio Act.*

Moreover, even if the Ohio Act were interpreted as permitting the establishment of resale prices by notice alone, in addition to permitting the establishment of prices by written contracts, it would comply with paragraph 3 of the McGuire Act. Paragraph 3 covers any state statute which "in substance provides" that it is unfair competition for a person to sell any commodity at less than the price prescribed in a written contract, whether the person so selling is or is not a party to such a contract. The Ohio Act, as so interpreted, would make it unfair competition for Hudson to sell Lilly commodities bearing Lilly's trademark at less than the price Lilly has prescribed in written contracts with others, whether Hudson is or is not a party to such a contract.

Hudson's argument that the McGuire Act covers only state statutes which require, as well as permit, the establishment of resale prices by a written contract does violence not only to the language of paragraph 3 but also to the intent of Congress in passing the McGuire Act. Congress made it as clear as the English language could that the McGuire Act "is designed to restore the effectiveness of . . . [fair-trade] acts by

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* Section 1333.32(A) provides that it shall be unfair competition "for any distributor with notice that a proprietor *has established* a stipulated minimum resale price. . . ." (Emphasis supplied).

Section 1333.28(I) applies to any distributor "who, with notice that the proprietor *has established* a minimum resale price. . . ." (Emphasis supplied).

making it abundantly clear that Congress means to let State fair-trade laws apply in their totality" and to permit the states "to experiment further with fair-trade legislation."*

In attempting to support the various sub-arguments which it appears to be raising, Hudson includes references to various sources entirely irrelevant to the question presented. These include random statements of various members of Congress having no discernible relation to any of Hudson's points, and citations to federal cases not involving state fair trade statutes, to support the truism that the antitrust laws prohibit price-fixing. Perhaps the most extreme examples of this irrelevant material are the voluminous quotations from bills proposed to the Congress, and scattered comments of all and sundry upon them, subsequent to the enactment of the McGuire Act. These materials apparently are relied upon as "legislative history" of the McGuire Act. All of this "history" occurred after the passage of the McGuire Act and is irrelevant. *United States* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 348-9 (1963). It is beside the point for the further reason that it relates to bills which were neither passed nor voted upon by the Congress.**

Hudson even goes to the extreme of arguing that the introduction by Congressman Harris of a proposed amendment to the McGuire Act in 1959 (H. R. 1253), a bill never passed or voted on, evidenced a belief on

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* H.R. Rep. No. 1437, 82d Cong., 2d Sess., at pp. 2, 5 (1952).

** In *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 392-3 (1951), this Court stated that such materials relating to bills proposed to the Congress prior to the Miller-Tydings Act, which were not passed or voted upon, did not form a legitimate part of the legislative history of that Act.

the part of the entire Congress that the McGuire Act does not authorize a trademark owner to establish resale prices by notice.* None of the materials cited are relevant to a consideration of the meaning of the McGuire Act and none cast any doubt on the validity of the Ohio Act as authorized by the McGuire Act.

When all is said and done, Hudson's argument is reduced to an attempt to create a conflict between the McGuire Act and a state fair trade law by a tortuous, literalistic parsing of the words of the two statutes. When viewed substantively, and on a reading of the statutes to mean what they say, the argument cannot stand analysis in the light of the clear Congressional purpose.

D. The Ohio Act Introduces No New Concept of Trademark Law and Is Unaffected by the Lanham Act.

Hudson's brief (p. 75) professes to regard as a new concept the recognition by the Ohio Act of the continuing proprietary interest of the owner of a brand, name or trademark and states that the most ardent advocates of fair trade have been unable to find any basis in law for it. One need look no further than the case of *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936) to find that there is nothing novel about the concept and that it was recognized by the Justices of this Court, without a single

* This proposed amendment of the McGuire Act was not included in subsequent bills introduced by Congressman Harris in later Congresses (H.R. 7685, introduced June 15, 1961; H. J. Res. 636, introduced February 21, 1962; and H.R. 3669 introduced February 11, 1963). Under Hudson's theory, the omission of the proposed amendment from these bills indicates that, on further reflection, the entire Congress concluded that the contracts arising from conduct of the parties described in the Ohio Act are fully authorized by the McGuire Act.

dissent, as an interest to which the states might constitutionally accord protection through fair trade laws. Even though the Illinois fair trade statute involved in that case did not specifically declare the proprietary interest concept, this Court twice pointed out that the primary aim of the statute was "to protect the property—namely, the goodwill—of the producer, which he still owns" and that "[a]ppellants own the commodity; they do not own the mark or the good will that the mark symbolizes" (299 U. S. at pp. 193, 194).

Even if there were something new about the concept, it would make no difference in view of (a) the clear provision of paragraph 2 of the McGuire Act which makes lawful any contracts or agreements lawful "under any statute, law, or public policy now *or hereafter in effect* in any State, Territory, or the District of Columbia" (emphasis supplied), (b) the clause "in substance provides" in paragraph 3 of the McGuire Act, and (c) the unequivocal declaration that the states were authorized "to experiment further with fair-trade legislation". H. R. Rep. No. 1437, 82nd Cong., 2d Sess. at p. 5 (1952).

Hudson also argues, for the first time in its brief in this Court, that the Lanham Act, 15 U. S. C. § 1127 (1958), precludes the Ohio Act because of the preemption by the Congress of "the subject of trade-marks in commerce" (Br. 75). The argument is almost incomprehensible. It speaks as though the Lanham Act had something to do with resale price maintenance, which it does not; as though Congress in the McGuire Act had not expressly consented to the enactment by the states of fair trade legislation applying to interstate com-

merce, which it so clearly did; and as though the Lanham Act had come after the McGuire Act instead of the other way around.

Article I, Section 8, Clause 8 of the United States Constitution confers on the United States Congress sole power to legislate in the field of patents and copyrights. No such power over trademarks is conferred. Hudson indicates awareness of this when it makes the incredible statement (Br. 77) that the Ohio Act "would repeal the established law of copyrights and patents".

The right of the Federal Government to legislate in the field of trademarks is based on the commerce clause, the same constitutional provision which empowered the Congress to enact the Sherman Act and the McGuire Act.* Congress, by the McGuire Act, has specifically delegated to the states the power to authorize the establishment of minimum prices for the resale in interstate commerce of commodities identified by trademarks. Even if there were any inconsistency between the Lanham Act and the McGuire Act, the specific provisions of the McGuire Act would prevail since that statute was enacted subsequent to the Lanham Act.**

There is in fact no inconsistency between the Ohio Act and the Lanham Act. The purpose of the Lanham Act is to protect against misleading use ("passing off") in interstate commerce of trademarks registered under the Act. *Federal-Mogul-Bower Bearings, Inc.* v. *Azoff*, 313 F.2d 405, 409 (6th Cir. 1963). To this extent

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* U. S. Const. art. 1, § 8, cl. 3

** The Lanham Act was enacted in 1946 (60 Stat. 427) and the McGuire Act in 1952 (66 Stat. 632).

only, Congress had "preempted" the field. *Philco Corporation* v. *Phillips Mfg. Co.*, 133 F. 2d 663 (7th Cir. 1943).

The Ohio Act, on the other hand, is limited to defining the substantive law of resale price maintenance, and trademarks are considered solely for the purpose of identifying those commodities lawfully subject to resale price restrictions within the State of Ohio.

Even if the Lanham Act had displaced state power over resale price maintenance in interstate commerce, the same commerce clause which enabled it to do so would equally enable it to restore state power by enacting the McGuire Act. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946).

None of the cases cited by Hudson on this branch of the case has anything to do with the arguments Hudson advances here.*

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* *Time Inc.* v. *T.I.M.E., Inc.*, 123 F. Supp. 446 (S. D. Calif. 1954) was an ordinary trademark infringement suit. The case is significant here, if at all, only for its express recognition of the fact that, although federal remedies for infringement are afforded by the Lanham Act, "ownership of the mark itself arises under and is governed by state law . . ." (123 F. Supp. at p. 453). Both *Sunbeam Corp.* v. *Wentling*, 192 F.2d 7 (3d Cir. 1951) and *Sunbeam Corp.* v. *Payless Drug Stores*, 113 F. Supp. 31 (N. D. Calif. 1953) involved an attempt to establish minimum resale prices as a common law right in the absence of any applicable fair trade statute. *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 436 (1940) was a Sherman Act conspiracy case not involving or mentioning fair trade contracts or fair trade laws. *United States* v. *Univis Lens Co., Inc.*, 316 U. S. 241 (1942) and *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944) were Sherman Act conspiracy cases in which the basic issue was the validity of restrictive patent licensing systems. In each case the Miller-Tydings Act was held to be inapplicable to purported fair trade contracts because the patentee attempted to set resale prices on commodities manufactured by others—its licensees. The fair trade contracts entered into by Lilly under the Ohio Act are limited to commodities produced by Lilly, the trademark owner.

E. The Ohio Act Does Not Conflict with the Federal Food, Drug and Cosmetic Act.

Section 1333.33(D) of the Ohio Act permits the sale of a trademarked commodity at less than the minimum resale price provided the seller has removed the trademark from the article. Hudson argues that the removal of trademarks on drugs "is contrary to the national policy expressed by the provisions of the Federal Food, Drug, and Cosmetic Act" (Br. 79). In addition, Hudson argues that anyone who sells a trademarked product after the trademark has been removed has "passed off" the goods as his own and, consequently, is "in serious trouble as a tort feasor" (Br. 78).

It is difficult to follow Hudson's reasoning on this point. It is apparent on the face of the Food, Drug and Cosmetic Act provision cited by Hudson (21 U. S. C. § 331(b)) that removal of labeling is prohibited only if it results in adulteration or misbranding. The same Act provides (21 U. S. C. § 352(b)) that a drug is misbranded:

> "If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer *or distributor*. . . ." (Emphasis supplied).

Since Hudson is a distributor of drug products, Hudson is not prohibited by the Federal Food, Drug and Cosmetic Act from removing the labeling of the manufacturer so long as it places on the drug its own label complying with Food and Drug Administration requirements. The statutory requirement is fully met if any one of the three—manufacturer, packer or dis-

tributor—is identified on the label. The Regulations under the federal Act recognize this.*

Obviously Lilly could not treat Hudson as a tort-feasor if Hudson exercised its right to substitute its label for Lilly's. By establishing resale prices under the Ohio Act, Lilly has accepted its provisions, including the provision permitting a retailer to avoid the necessity of observing the fair trade prices by avoiding any use of Lilly's trademarks or name.

All the Ohio Act says about removal of trademarks is that a distributor has a defense to a suit under the Act if he has removed the proprietor's trademark and made no use of the trademark in selling the commodity. Even if there were some independent legal impediment to removal of the trademark—which there is not—it would not follow that Hudson was entitled to use Lilly's trademarks for its own purposes in a manner prohibited by the Ohio Act.

Hudson's whole argument on this point makes two points plain: (1) that the Ohio Act does not interfere in any way with Hudson's ownership or resale of any commodity as such, but only conditions its right to use Lilly's trademarks or name, and (2) Hudson's real concern is not with the commodity it owns but with the right to misuse the Lilly name.

In permitting disregard of the minimum resale prices where no use is made of the proprietor's trade-

* "If a drug or device is not manufactured by the person whose name appears on the label, the name shall be qualified by a phrase which reveals the connection such person has with such drug or device, such as 'Manufactured for and Packed by .....,' 'Distributed by .....' or other similar phrase which expresses the facts." 21 C.F.R. § 1.102(a) (1963).

mark, the Ohio Act in no way conflicts with the Federal Food, Drug and Cosmetic Act.

IV.

The constitutionality of the Ohio Act under the due process clause of the Fourteenth Amendment is settled by decisions of this Court.

Hudson contends that the Ohio Act violates the due process clause of the Fourteenth Amendment "by reason of an uncontrolled and arbitrary delegation of power over the property and business lives of others without any procedural safeguards". (Br. 80). Hudson concedes, however, that this argument flies in the face of the unanimous decision of this Court in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936), where this Court specifically considered and rejected an identical attack upon the non-signer provisions of the Illinois Fair Trade Law.*

Since the *Old Dearborn* decision, this Court has reviewed fair trade legislation in two decided cases. *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951); *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956). One can search these decisions in vain for even the slightest implication that state fair trade legislation binding non-signers may be unconstitutional under the United States Constitution.

* These same challenges to the Illinois Fair Trade statute were also rejected in *McNeil* v. *Joseph Triner Corp.*, 299 U. S. 183 (1936), decided together with the *Old Dearborn* case. This result was also reached in the companion cases of *Kunsman* v. *Max Factor & Co.*, 299 U. S. 198 (1936) and *The Pep Boys, Manny, Moe & Jack of California, Inc.* v. *Pyroil Sales Co., Inc.*, 299 U. S. 198 (1936), both of which upheld the constitutionality of the California Fair Trade statute.

In the *Schwegmann* case, which was concerned solely with whether the Miller-Tydings Act was intended by Congress to cover non-signers, the Court recognized at least three times that Congressional approval of enforcement against non-signers would be constitutional.*

In the *McKesson* case, the Court stated that "[t]he issue presented is a narrow one of statutory interpretation", the sole question being the validity of a manufacturer-wholesaler's fair trade agreements with independent wholesalers with whom it was in competition.**

The United States Court of Appeals for the Fifth Circuit in *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.*, 205 F. 2d 788 (5th Cir. 1953) specifically considered an attack on the constitutionality of the Louisiana fair trade statute, containing a non-signer provision, and found that statute constitutional under the Fourteenth Amendment. This Court denied certiorari.***

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* (1) "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, *absent approval by Congress.*" (341 U. S. at p. 386) (Emphasis supplied).

(2) "*Had Congress desired* to eliminate the consensual element from the arrangement and to permit blanketing a state with resale price fixing if only one retailer wanted it, we feel that different measures would have been adopted—either a non-signer provision would have been included or resale price fixing would have been authorized without more." (341 U. S. at p. 390) (Emphasis supplied).

(3) "It should be remembered that it was the state laws that the federal law was designed to accommodate. Federal regulation was to give way to state regulation. When state regulation provided for resale price maintenance by both those who contracted and those who did not, and the federal regulation was relaxed only as respects 'contracts or agreements,' the inference is strong that *Congress left the noncontracting group to be governed by preexisting law.*" (341 U. S. at p. 395) (Emphasis supplied).

** 351 U. S. at p. 309 (1956).

*** 346 U. S. 856 (1953).

The Ohio Act falls squarely under the *Old Dearborn* decision. The Ohio Act sets forth in detail the legislative purposes for its enactment.* The notice provisions of the Ohio Act expressly provide that a nonsigner is bound only when he purchases a trademarked article for resale in Ohio with notice that minimum resale price restrictions have been imposed (Section 1333.28(I)). In the *Old Dearborn* case, the Court, in rejecting an argument that the Illinois Fair Trade Law violated the federal due process clause, said (299 U. S. at p. 193):

> "It is first to be observed that § 2 [the nonsigner provision] reaches not the *mere* advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *wilfully* and *knowingly*. We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds wilfully to resell in disregard of it. [Emphasis the Court's.]
>
> "In the second place, § 2 does not deal with the restriction upon the sale of the commodity *qua* commodity, but with that restriction because the commodity is identified by the trade-mark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate

* Section 1333.27.

means to that perfectly legitimate end, and not as an end in itself."

Hudson says that "[t]he Ohio statute goes much further" than the Illinois statute involved in the *Old Dearborn* case (Br. 82). Its argument boils down to a pointless quibble: that non-signing distributors can be bound by a notice which is *only* a notice, but not by a notice which under the circumstances and the applicable state law also gives rise to a contract.

Hudson places heavy reliance (Br. 82, 84) on *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936) and *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116 (1928). Both of these cases were specifically considered and held inapplicable by this Court in the *Old Dearborn* decision (299 U. S. at p. 194):

> "We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in *Eubank* v. *Richmond*, 226 U. S. 137, 143; *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 121-122; and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311. In those cases the property affected had been acquired without any preexisting restriction in respect of its use or disposition. The imposition of the restriction *in invitum* was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it."*

* The remaining two cases cited by Hudson (Br. 83-84), *Browning* v. *Hooper*, 269 U. S. 396 (1926) and *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963) involved facts and issues completely dissimilar to those presented in this case. In addition, the *Browning* case antedated this Court's decision in *Old Dearborn*.

Hudson is suggesting that this Court reweigh the wisdom of fair trade legislation and substitute its judgment for that of the Ohio Legislature. No principle of federal constitutional law is more firmly established than that decisions as to the economic and social wisdom of a statute are legislative, not judicial decisions. *Olsen* v. *Nebraska*, 313 U. S. 236 (1941); *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, 536-7 (1949); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421 (1952). As recently as last year, Mr. Justice Black, speaking for a unanimous Court in *Ferguson* v. *Skrupa*, 372 U. S. 726, 731-732 (1963), stated:

> "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."

The economic arguments and data for and against fair trade legislation have been the subject of dispute for decades. It has been shown by fair trade proponents, although of course disputed by others, that the overall result of fair trade laws is to lower, not increase, prices; that the price-cutting practices condemned by the fair trade laws threaten serious injury to producers of trade-marked and branded goods and businesses generally, large and small, and to lead to

destructive price wars; that fair trade laws help to prevent the growth of monopoly in distribution; that such laws are an effective means of preventing unfair methods of competition deceptive to the public; that the highly visible bargains offered by price-cutters on nationally known brands are often a screen for that not-so-visible price inflation on lesser known items; that loss-leader practices take various forms, such as sales either below cost or at substantially reduced mark-ups to lure the customer into the store; that the fair trade laws contribute significantly to the country's general social welfare and are conducive to the continued existence of a large number of small independent business concerns rather than concentration of retailing in the hands of a relatively small number of large retailers; and that in various other ways such laws promote the public welfare.

After days and days of hearing all the pros and cons, the Ohio legislature adopted the Ohio Act as sound economic policy for the State of Ohio.*

Hudson is simply endeavoring here to wage anew the battle which was lost in the Ohio Legislature by the opponents of fair trade legislation. The *Old*

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* Hudson's arguments as to the merits of cut-rate pricing in general, and its own pricing policies in particular, are of course irrelevant in considering the constitutionality of the fair trade laws. As shown by the cases already cited, these arguments raise questions appropriate only for legislative consideration. It is also clear that where a legislative body finds the existence of a general evil requiring remedial action, it has power to legislate generally, and it is immaterial whether or not all or any of the abuses aimed at by the statute have been engaged in by the defendant in a particular case arising under it. *North American Co.* v. *Securities & Exchange Commission*, 327 U. S. 686, 710-11 (1946); *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201 (1912).

Dearborn decision established nearly 30 years ago that the United States Constitution contains nothing to prevent a state from enacting a fair trade law permitting resale price maintenance. At no time since has there been any amendment of the Constitution to change its meaning on this point.

V.

Whether provisions of a state act held invalid by this Court are severable from the remaining provisions of the Act is a question solely for the State Courts.

The last question which Hudson attempts to raise is whether the provisions of the Ohio Act which Hudson claims are unconstitutional "are so commingled and entwined with the remainder of the Act and so inseparable therefrom as to make the entire Act unconstitutional under the Federal Constitution" (Br. 5). Hudson's brief contains no argument on this question.

The question whether provisions of a state act held invalid by this Court are severable from the remaining provisions of the Act has long been recognized to be a matter for the state courts to decide. *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); *Dorchy* v. *State of Kansas,* 264 U. S. 286 (1924). The severability argument therefore presents no federal question.

If this Court should decide that any provision of the Ohio Act is unconstitutional under the United States Constitution, the case should be remanded to the Ohio courts for a determination of the severability question.

CONCLUSION

The judgment appealed from is not final, and none of the federal questions raised by Hudson were passed upon by the Ohio Supreme Court. Therefore, this Court lacks jurisdiction and should dismiss the appeal.

In the event that this Court determines that it has jurisdiction, the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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April 8, 1964

APPENDIX A

IN THE COURT OF COMMON PLEAS

STATE OF OHIO
COUNTY OF CUYAHOGA } ss.

HUDSON DISTRIBUTORS, INC.,
Plaintiff,

vs.

ELI LILLY & COMPANY,
a corporation,
Defendant.

Case No. 730,118

SECOND AMENDED ANSWER TO CROSS-PETITION WITH INTERROGATORIES ANNEXED

FIRST DEFENSE

Plaintiff admits the allegations contained in paragraphs 3, 4, 5, 6, 7 and 8 of the cross-petition.

Plaintiff admits that it has sold, offered for sale and advertised for sale at prices less than defendant's fixed minimum retail prices commodities of defendant after notice of the establishment of such prices as alleged in paragraph 9 of the cross-petition, but denies that in so dealing in commodities manufactured by defendant plaintiff has acted willfully. Plaintiff states that it has carried on the said activities under the good faith belief that the Ohio Fair Trade Act is unconstitutional which belief plaintiff continues to maintain.

Plaintiff admits the allegations contained in paragraph 10 of the cross-petition.

Plaintiff denies the allegations contained in paragraphs 11, 12, 13 and 14 of the cross-petition.

Further answering, plaintiff denies each and every allegation of the cross-petition not herein expressly admitted to be true.

SECOND DEFENSE

For its second defense plaintiff says that at the time of the transactions set forth in the cross-petition, and at the time defendant filed the said cross-petition, defendant, a foreign corporation, was transacting business in the State of Ohio without a license; that on or about February 9, 1962, defendant filed with the Secretary of State of Ohio a purported application for a license to transact business in Ohio; that said purported application contained material misrepresentations of fact and failed to comply with the requirements of *Ohio Revised Code* Section 1703.29; that defendant has not yet properly qualified to do business in the State of Ohio; that in direct contravention of *Ohio Revised Code* Section 1703.29 defendant is attempting to enforce its purported fair trade contract in the courts of the State of Ohio without having first properly obtained a license to do business in this state as a foreign corporation.

THIRD DEFENSE

For its third defense plaintiff says that defendant, by the terms of its fair trade contracts with retailers, and in particular by the terms of paragraph 6 of said contracts, a specimen of which is annexed to the cross-petition as "EXHIBIT B", defendant compels such

retailers to enter into unlawful horizontal price fixing agreements with other competing retailers. Such contracts are in violation of Section 1 of the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U. S. C. Sections 1 through 8, and Section 5(a)(5) of the McGuire Act, 66 Stat. 632, 15 U. S. C. Section 45 (a)(5); that by reason of the express terms and provisions of the McGuire Act aforesaid defendant's fair trade contract is unlawful and unenforceable and hence may not be enforced against this plaintiff.

The case was submitted to the Honorable Eugene R. McNeill, Judge of the Court of Common Pleas of Cuyahoga County by Assignment, upon the pleadings, an Agreed Statement of Facts, evidence introduced by stipulation, and upon briefs of counsel. By agreement between the parties the case was submitted solely on the question of the constitutionality of the Act; there was not submitted the question of the relief to which Lilly would be entitled under the Act if it were upheld.

Fourth Defense

Defendant is at the present time permitting and has been permitting retailers throughout the State of Ohio to advertise, offer for sale and sell commodities bearing defendant's trademarks or trade names at prices below minimum retail prices fixed by defendant pursuant to the Ohio Fair Trade Act. By reason thereof defendant is precluded from enforcing said minimum retail prices as against plaintiff.

Fifth Defense

Defendant has countenanced and does now countenance in the State of Ohio prescription sales of its

products below fair trade prices fixed by defendant. Such conduct by defendant constitutes a modification of defendant's fair trade contracts and defeats defendant's right to enforce fair trade prices on both prescription and non-prescription sales.

Plaintiff annexes hereto certain Interrogatories which it demands be answered plainly and fully under oath by an officer of the defendant, each separately and independently, and not in a series.

WHEREFORE, plaintiff prays that the relief prayed for in its second amended petition be granted and that defendant's cross-petition be dismissed at defendant's costs and for such other, further and supplemental relief as will be equitable in the premises.

LANE, KROTINGER & SANTORA
300 Chester-Twelfth Building
Cleveland 14, Ohio 861-1819

By MYRON N. KROTINGER
Myron N. Krotinger
Attorneys for Plaintiff

STATE OF OHIO
CUYAHOGA COUNTY } ss:

MYRON N. KROTINGER, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff, a corporation; that he is duly authorized in the premises; that he has read the foregoing Second Amended Answer to Cross-Petition with Interrogatories Annexed and that the allegations, averments and denials therein contained are true as he verily believes.

MYRON N. KROTINGER
Myron N. Krotinger

SWORN to before me and SUBSCRIBED in my presence this 8th day of July, 1963.

MORTON L. STONE
Notary Public
Morton L. Stone. My commission expires September 3, 1963

SERVICE

Service of the foregoing Second Amended Answer to Cross-Petition with Interrogatories Annexed has been made by delivering a copy thereof to Henderson, Quail, Schneider & Peirce, National City Bank Building, Cleveland, Ohio, attorneys for defendant, this 8th day of July, 1963.

LANE, KROTINGER & SANTORA
Attorneys for Plaintiff

By MYRON N. KROTINGER
Myron N. Krotinger

APPENDIX B

TABULATION OF QUESTIONS URGED BY HUDSON

(References in parentheses are to pages of this Brief.)

Question:	When First Raised Below:	Where Referred to or Decided by Court Below:
1(a) *McKesson* Case*	Ohio Court of Appeals (7, 10, 25)	Never
1(b) Horizontal Agreement**	Ohio Supreme Court (8, 10, 25)	Never
1(c) Notice**	Court of Common Pleas (6, 10, 29)	Never
2 Due Process	Court of Common Pleas (Abandoned on Appeal), (6, 10, 31)	Never
3 Severability***	Court of Common Pleas	Never
4 Lanham Act	Never (9, 10, 32)	Never
5 Food, Drug, and Cosmetic Act	Ohio Supreme Court (9, 10, 32)	Never

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* Question not raised by the facts of this case (R. 33-5).

** Question not raised by facts of this case (36; 42) and premised on unadjudicated interpretation of the Ohio Act (26-8; 30-1, 52-3).

*** Question premised on unadjudicated interpretation of the Ohio Act (18, 67).